The Solicitors' Journal

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EDITORIAL

WHEN the Legal Aid and Advice Bill enters upon the Committee Stage, the members of the committee will have the benefit of a great deal of informed comment which has appeared in the columns of the professional and lay Press during the last two months. As Mr. R. E. MANNINGHAM-BULLER pointed out in a recent letter, this comment may well influence the final shape of the Bill and, when combined with the outstanding contributions made by solicitor Members of Parliament during the second reading debate, it represents a fair cross-section of the opinions of those who will eventually have to make the Bill work.

In discussions at all levels, three points have overshadowed all others. The first is the restriction of assistance at legal aid centres to oral advice given by the peripatetic or itinerant solicitor; next comes the liability of the unsuccessful assisted litigant in regard to costs; and thirdly, the remuneration of the assisted litigant's solicitor.

Critics of the Bill are satisfied that it contains adequate provision for the applicant who will only need oral advice. It caters equally well for the applicant whose problems cannot be solved without litigation. Argument develops, however, over the case which requires expert assistance in correspondence and negotiations but can probably be settled ultimately without going into court. Under present proposals this intermediate class of case cannot be dealt with at a legal advice centre, because those centres are limited to the giving of oral advice. It follows that any case involving more than oral advice must come under the legal aid portion of the scheme and the applicant will have to invoke the somewhat cumbersome procedure of submitting his case to the local committee and his means to the National Assistance Board. The Government's reasons for excluding this intermediate class of case from legal advice centres is that such centres will be insufficiently equipped and staffed to deal with correspondence and negotiations. This decision has been supported by a number of practising solicitors on a different ground, namely, that a negotiator who has no writ in his pocket will be at a serious disadvantage and that claims will not be settled at a fair figure through the medium of a centre which restricts its activities to legal advice.

We feel that there is an overwhelming argument for increasing the jurisdiction of legal advice centres to allow the solicitors concerned in them to undertake correspondence in the simple type of dispute where one letter may prove to be sufficient. It may be some time before such centres can deal with disputes involving substantial negotiations, but it may be possible to devise a half-way house between the legal aid centre and the local committee for this purpose. It is clearly right that the system of filtering claims by the local committee and National Assistance Board should be applied before a litigant is allowed to incur the costs of actual litigation, but the much lower costs of negotiation might be sanctioned without these safeguards. A suggestion on these lines for employing local solicitors in negotiation and letter writing appeared in our correspondence columns on 15th January.

Argument for and against the rule that an unsuccessful assisted litigant should be liable for his opponent's costs has been well balanced. Those who favour the rule are anxious to see some adequate check on unnecessary proceedings or, like Mr. CLAUD MULLINS, are concerned lest undue encouragement should be given to litigation as opposed to conciliation. If the contribution which the assisted litigant is required to undertake under the scheme really represents the full amount which he can afford to pay, this should in itself be a deterrent to a light-hearted approach to proceedings, but, in any event, as the amount payable to the successful opponent is in the discretion of the judge, it seems unlikely that the rule will give rise to hardship in practice.

There has been an understandable reticence on the part of the profession to give prominence to objections concerning their own remuneration under the Bill. There is an almost universal desire to see a workable scheme take shape and to accept whatever reasonable sacrifices it may entail. It has, however, been pointed out that the party and party costs payable by the assisted litigant's opponent will sometimes exceed the solicitor and client costs payable under the scheme to the litigant's solicitor when the reduction of 15 per cent. has been made in those costs. Both with a view to avoiding double taxation and in fairness to the solicitor it seems reasonable that he should have the option of taking the party and party costs in such cases.

There has been very little published comment on the clauses which reduce the remuneration of solicitors and counsel in the High Court to 85 per cent. of their normal fees. The profession as a whole is not guilty of undue self-interest in this matter and hesitates to give a false impression to the public by airing its views. We feel, however, that there would be general satisfaction amongst solicitors and counsel alike if publicity were given to the reasons for this reduction, because, in the absence of explanation, it may be taken to be an admission that the normal scales are unfairly high. This clearly is not the real reason and perhaps the Government will say so.

CURRENT TOPICS

Sir Arthur Stiebel

SIR ARTHUR STIEBEL, Registrar in Companies Winding-up and in Bankruptcy of the High Court of Justice from 1920 to 1936, and Senior and Chief Registrar from 1936 to 1947, died on 15th February within a fortnight of his seventy-fourth birthday, and fifty years after his call to the Bar at Lincoln's Inn. He commenced his career in the chambers of Eustace Smith, a busy Chancery practitioner of his day and, when the 1914–18 war came, he served as a lieutenant in the Royal West Kent Regiment, and was unfortunate enough to lose a leg. His wide and profound knowledge of company law and practice commanded universal respect. In 1925 he was appointed to membership of the Company Law Amendment Committee, and his work on Company Law and Precedents is a mine of accurate information and guidance. He also wrote a work on Australian and New Zealand Company Law. Sir Arthur Stiebel's standards were exacting, not only towards those who appeared before him, but also towards himself, and his record of high devotion to duty will long remain an example to his successors.

Lands Tribunal Bill

A NEW statutory tribunal is promised in a Bill introduced in the Commons by the Chancellor of the Exchequer on 16th February. The Lands Tribunal, as it is to be called, is to take the place of official arbitrators and others in determining "certain questions relating to compensation for the compulsory acquisition of land and other matters, to amend the Acquisition of Land (Assessment of Compensation) Act, 1919, with respect to the failure to deliver a notice of claim, and for purposes connected therewith." The questions of compensation are those directed by any public or local or private Act to be determined by one or more of the official arbitrators under the 1919 Act, or of the referees appointed under Pt. I of the Finance (1909–10) Act, 1910, disputed claims for compensation under the Lands Clauses Acts against an authority to which the 1919 Act applies, questions of apportionment under s. 116 of the Lands Clauses Consolidation Act, 1845, disputes as to the determination of development values, jurisdiction conferred on the authority under s. 84 of the Law of Property Act, 1925 (as to the discharge and modification of restrictive covenants), and any other jurisdiction conferred on one of the official arbitrators or referees mentioned above. The president is to be a barrister of at least seven years' standing, and the remainder are to comprise barristers or solicitors of like standing and persons experienced in valuation. The only appeal to be permitted is an appeal by way of case stated on a point of law. The Lands Tribunal will have a full discretion as to awarding costs and may tax or settle the costs, or direct how they are to be taxed.

Lawyer Members of Rent Tribunals

MRS. MANN'S remarks in the House of Commons on 16th February that from her experience in the House she found lawyers singularly unattractive and their political minds exceedingly baffling, and that she preferred an accountant member, whom she named, hardly deserved the attention they received. The best comment was that of Mr. HOGG—"We are not selected for our sex appeal." The occasion was the Committee Stage of the Landlord and Tenant Bill, when an amendment was proposed that at least one member of each rent tribunal should be a barrister or solicitor of not less than seven years' standing. Mr. BEVAN gave two reasons for opposing the suggestion. The first was because it often happened that lawyers were exceedingly busy people, and the administration should not have to hold up the appointment of a tribunal until a suitable person of a specified profession has been found. The second reason was: "They are fact-finding tribunals and, judging by experience in the House, no lawyer is able to look at a fact without reducing it to such a one-dimensional situation that it loses all humanity." This appears to mean that members of Parliament who are also lawyers are incapable of human sympathy and understanding and therefore all lawyers are similarly incapable. Both premise and inference are obviously nonsense. More to the point was Mr. MARLOWE's argument that the tribunals will not be adjudicating about a temporary three months' security of tenure, but about a statutory tenancy that may last a term of years. Where a tribunal has no lawyer to guide it, the experience of centuries enshrined in common-law decisions on the many circumstances in which a citizen may legitimately complain that he has been inadequately heard, or has been heard by a biased tribunal or one that seems to be biased, or has had his case decided against him on inadequate or unreliable evidence, will be jettisoned. Only the training of a lawyer can produce the ability immediately to recognise any such situation as soon as it arises, and to correct it.

Compensation for Loss of Employment

A PRIVATE member's Bill proposes that any person who suffers loss of employment or loss of or diminution of salary, wages, or emoluments or the worsening of his position with respect to his conditions of service shall be entitled to compensation, except where the loss arises from serious or wilful misconduct or by reason of the voluntary termination of a contract of, or where a person has been employed for less than, five years. A number of classes are excluded, including established civil servants, members of the forces, policemen, established employees of local or public authorities and officers and men of the merchant service. It is proposed that the amount of compensation should be one twelfth part of the total remuneration and emoluments paid to the person concerned during his period of employment. For other losses, scales of compensation, it is proposed, should be laid down in regulations. It seems that the grievance which the Bill proposes to meet is linked with social security, but was not provided against in the various recent insurance Acts. It is therefore provided in the Bill that every employer should be required to insure against the liability to make such compensation payments.

Contact Men

IT is good to see that a solicitor, Sir EDWIN SAVORY HERBERT, has been appointed to preside over the Government committee which, as the Prime Minister announced in the Commons on 15th February, is to inquire into the activities of "contact men." Sir Edwin is exceptionally well qualified for the appointment because of his experience both as senior partner in the firm of Sydney Morse & Co. and in the late war as Director-General of Postal and Telegraph Censorship Department. Between 1937 and 1939 he was a member of various departmental committees, and has been a member of the Council of The Law Society since 1935. The other members of the committee are Mr. E. A. CARPENTER (President of the Manchester Chamber of Commerce), Mr. DINGLE FOOT (barrister and Parliamentary Secretary to the Ministry of Economic Warfare from 1940 to 1945), Sir GEORGE GATER (clerk to the London County Council from 1933 to 1939 and Permanent Under-Secretary for the Colonies from 1939 to 1947) and Mr. C. J. GEDDES (general secretary of the Union of Post Office Workers). The terms of reference are: "To inquire how far persons are making a business of acting as specialists in the submission of applications for licences or permits, or otherwise as intermediaries between Government departments and the public; and to report whether the activities of such persons are liable to give rise to abuses, and to make recommendations. The inquiry is not intended to cover the activities on behalf of their clients by members of recognised professions."

THE COMMON LAW IN 1948—II

LAW is not, as every agitator knows, synonymous with justice. Which is perhaps as well, for your client's idea of justice will scarcely be the same as my client's. The law is identical for both of them, however, and, assuming no factual dispute, it merely remains for you and me to explain to the respective parties what the law is. The successful adviser is he who can sense legal development, who can spot the particular set of new facts to which ancient principle will be applied conveniently for his client. The law will not invent new duties, even an obligation between neighbours to rectify promptly the mistakes of a postman (*ante*, p. 32); yet adaptations of principle sometimes bear an aspect of extension.

Take the tort of negligence, for example. The duty on which the right of action depends is one of reasonable care not to injure persons so placed that it might be reasonably foreseen that they might be damnified by the act or omission in question. There is no absolute standard of what is reasonable care or of what can reasonably be foreseen. In particular cases the law has settled degrees of obligation as between an occupier of land and persons coming thereon. Virtually no duty (deliberately harmful acts excluded) is owed to a trespasser. The essential point to be noted in *Buckland* v. *Guildford Gas Light & Coke Co., Ltd.* (1949), 93 SOL. J. 41, is that the defendants were *not* the occupiers of the land on which the plaintiff's 13-year-old daughter met her death. They maintained a high voltage electric cable system running across the land and passing through the branches of a tree up which the child climbed. Morris, J., held on the facts that, even if the child had been a trespasser *quoad* the occupiers of the land (and the defendants had not discharged the onus of proving that she was), yet from the point of view of the defendants she was a person whom they ought reasonably to have had in contemplation as one so closely affected by their acts as likely to suffer damage from any lack of care or failure to warn of danger. The plaintiff recovered damages.

Another case of negligence in circumstances fortunately rare is *Ball* v. *London County Council* [1948] 2 All E.R. 917. There, Stable, J., held the defendants liable for injuries and loss caused to the plaintiffs by a defective boiler gratuitously installed by them (during the subsistence of the tenancy) in a house which they had let to one of the plaintiffs. The learned judge found it irrelevant that the defendants and one of the plaintiffs stood in the relationship of landlord and tenant. The duty which the defendants had broken depended on the law of torts, not of contract, and was owed to persons who in the ordinary course would use the boiler.

It is in connection with cases of negligence that the question of the liability of a master for the torts of his servant most frequently arises. *Warren* v. *Henly's, Ltd.* (1948), 92 SOL. J. 706, joins the select band of vicarious liability cases concerning other torts. It was sought to make garage proprietors liable for an assault committed on a customer by an attendant at one of their filling stations. There had been an argument between the plaintiff and the attendant arising out of the supply of petrol to the plaintiff's vehicle, and during the course of the argument the plaintiff had threatened to report the attendant to his employers, the defendants. Subsequently, the attendant asked the plaintiff if he still intended to report the matter, and, on receiving an affirmative reply, assaulted the plaintiff. At the time of the assault, the plaintiff had paid for the petrol and was about to leave the defendants' premises. Hilbery, J., referring to *Poland* v. *Parr & Sons* [1927] 1 K.B. 236, declined to leave the case to the jury, for the act of the attendant was one of personal vengeance, and had no connection with the discharge of any duty for the defendants, being neither an act of the class which the attendant was authorised to do, nor a tortious mode of doing an act within that class.

Nor is there any lack, in the recent reports, of novel situations in matters of contract. *Reed* v. *Dean* [1949] 1 K.B. 188, concerned an agreement for hire of a motor launch. The launch took fire soon after the beginning of the period of hire. No effective fire-fighting equipment was provided and the plaintiffs, parties to the contract, suffered injuries and loss. One of the questions which Lewis, J., considered was whether the omission to provide satisfactory fire appliances rendered the vessel unfit for the purpose for which it was hired, so as to constitute a breach of the implied warranty in the contract of hiring. The learned judge decided that it did, notwithstanding that the equipment in question was not needed to make the vessel go. Earlier in his judgment his lordship had held that such a warranty of fitness was to be implied notwithstanding that the launch was hired by name, so distinguishing *Robertson* v. *Amazon Tug Co.* (1881), 7 Q.B.D. 598, where the contract was not (as pointed out in Halsbury, 2nd ed., vol. 16, p. 516 (*m*)) on the true view one of hire.

Not until recent years would the intricate background of *Horn* v. *Minister of Food* [1948] 2 All E.R. 1036 have been possible, with its State-sponsored purchase of potatoes complete with the paraphernalia of inspection by a potato merchant acting as agent for the Ministry, notices by the area potato supervisor, and so forth. Its chief interest for our present purpose lies in the demonstration it affords that the passing of the property in goods sold and the passing of the risk in case of their destruction may not always be simultaneous. True, s. 20 of the Sale of Goods Act, 1893, makes the risk pass *prima facie* with the passing of the property and not necessarily with delivery, but this, like other rules under the Act, is subject to agreement to the contrary. It was held, apparently on an overall construction of the contract in *Horn's* case, that in the particular circumstances the risk had passed to the buyer subject to a condition that the seller would use reasonable care in storage. Accordingly, when the potatoes became useless through deterioration and the buyer failed to take delivery, the seller (not being in breach of his obligation of care) was held entitled to recover either the price of the potatoes or an equivalent sum as damages for breach of contract in the failure of the buyer to take delivery.

Some general observations of Slade, J., in a sale of goods case will be of interest. His lordship had before him in *Champanhac* v. *Waller* [1948] 2 All E.R. 724 a contract which related to goods "as sample taken away" and which went on to say (they being Government surplus stock) "and we sell them to you with all faults and imperfections." Before construing these apparently inconsistent provisions, the learned judge said: "For many purposes there is all the difference in the world between a sale by description and a sale by sample. There are different legal consequences . . . which are set out respectively in ss. 13 and 15 of the Sale of Goods Act, 1893, but they have this much in common, that one may describe the goods which one is selling by giving expression to their colour, class, quality, nature, or type, or one can say in effect: 'I am not very good at expressing myself, and in any case I may leave something out. This is the type of goods that I am offering to sell you'—producing a sample. Although that is a sale by sample, it is none the less, in my view, an offer to sell goods the bulk of which will conform to the description which is conveyed to the buyer's mind by his being tendered the sample." In the case with which he was dealing, his lordship held that the two apparently contradictory phrases could be reconciled by reading them as requiring that the bulk should be of the same nature and type as the sample, but so long as the goods were of that type and quality they must be taken with any other imperfections they might have. The bulk did not, however, correspond with the sample and judgment was given for the buyers.

It is always comforting to the busy legal man of affairs to come upon a case based on an authority or a section of an Act which he remembers from his student days. Thus *Hadley*

v. *Baxendale* (1854), 9 Ex. 341—applied by Streatfeild, J., in *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* (1948), 92 SOL. J. 617. Or the well-known s. 4 (1) of the ubiquitous Sale of Goods Act, of which two new illustrations are reported. In each of these two cases there was no sufficient memorandum of the contract signed by the purchaser himself. The defendant in *Walford* v. *Narin* [1948] 2 All E.R. 85 had signed an agreement in which, however, the seller's name was nowhere stated. Subsequently, the defendant having orally repudiated the contract, his solicitors wrote in reply to a letter from the seller's solicitors and asked for a copy of the agreement, admitting that their client had signed it. Morris, J., thought that this was sufficient to supply the deficiency in the original memorandum, though in the result the plaintiff failed in his action because of a further omission, namely, the absence of any reference to an oral arrangement which had been come to concerning delivery of the goods. *Wilson* v. *Pike* (1948), 92 SOL. J. 513, deals with a more general point. There, a licensed auctioneer in the employ of the plaintiffs, a firm of auctioneers, knocked down goods to the defendant's agent, and on being informed by the agent that the defendant was the buyer, wrote the defendant's name in the sale catalogue against the description of the goods. The plaintiff firm accounted to the seller for the amount bid and then sued the defendant for it. For the defendant it was admitted that the marked catalogue would be a sufficient memorandum as between seller and buyer, but it was contended that the plaintiffs could not rely on it since it was as if they had signed it as agents for the defendant. Agreeing that one party to the contract could not be the agent of the other within s. 4 (*Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333), the Court of Appeal pointed out that the party seeking to rely on the contract before them was not the auctioneer who had made and signed the memorandum, but his employers. The memorandum was sufficient to carry them to success. The court also propounded afresh, without deciding, the question whether an auctioneer does not, when claiming the price of goods sold, sue not on the contract between vendor and purchaser but by virtue of his special property and lien and, in the general case, under his contract with the purchaser that the price shall be paid into his hands. That interesting speculation we in our turn leave to the reader, who, however, unlike the Court of Appeal, is for the time being bound by the opinion of Salter, J., in *Benton* v. *Campbell, Parker & Co., Ltd.* [1925] 2 K.B. 410.

J. F. J.

THE CUCKOO IN THE NEST

IN days when a home of one's own is a very precious possession tenants about to vacate their houses are often tempted to obtain, or attempt to obtain, possession of the premises for friends or relatives without asking leave of the landlord. It thus often happens that the agent or rent collector arrives one day to find that the tenant has moved elsewhere and the rent is tendered to him by a stranger. Assuming that the landlord is unwilling to accept the new occupant—what action should practitioners take to obtain vacant possession? The lay client regards the newcomer as a trespasser and demands proceedings against him immediately as such. The position is not always as simple as that, however, and the status of the occupant requires careful examination before proceedings are instituted, for if they are the wrong sort of proceedings the last state may very well be worse than the first.

It will be convenient to refer to the parties as " the tenant " and " the occupier "—the former having disappeared and the latter being now resident in the house.

Let us assume first that the tenant is a contractual tenant. The assignment or sub-letting which he has made may be " lawful " or " unlawful " according to whether it was forbidden or not by a covenant or condition (for a further discussion of what constitutes an unlawful sub-letting, see 92 SOL. J. 583). If there was a covenant not to assign or sub-let, then it is necessary to know whether the tenancy agreement contained a proviso for re-entry on breach of the covenant, for unless this is so the landlord has no grounds for claiming possession. His remedy is merely an action for damages for breach of covenant. In the usual weekly tenancy, however, there are no covenants, but the common form of rent book usually contains a condition printed upon the cover to the effect that the tenant is not to assign or sub-let without the landlord's permission. Breach of such condition gives an automatic right of re-entry although none was reserved. In this case, therefore, and where there is a proviso for re-entry on breach of covenant, the correct procedure is to serve notice upon the tenant under s. 146 of the Law of Property Act, 1925, requiring him to remedy the breach of covenant or condition, and pay compensation within a specified time. If the tenant does not comply, then proceedings can be instituted against him for forfeiture, for damages for failure to give vacant possession (*Henderson* v. *Van Cooten* (1922), 67 SOL. J. 228), and for arrears of rent, and against the occupier for an injunction and damages for trespass.

Even though there was no covenant or condition against assigning or sub-letting, it is still possible to take proceedings in the case of rent-restricted premises under para. (*d*) of Sched. I to the 1933 Rent Act, which gives a right to possession where the tenant has assigned or sub-let the whole house without the permission of the landlord. But this is subject to the overriding requirement of " reasonableness."

If the sub-letting was in breach of covenant or condition it is most important *not* to serve a notice to quit on the tenant, for the doing of that presupposes the existence of a tenancy capable of being so terminated and would turn an unlawful sub-tenancy into a lawful one. A similar result would follow the acceptance of rent after receiving knowledge of the breach (*March* v. *Christodoulakis* (1948), 64 T.L.R. 466).

In passing it may be noted that s. 5 (5) of the 1920 Act protects a *lawful* sub-tenant from eviction even though the tenant be evicted on some ground, and s. 15 (3) of the same Act provides that a lawful sub-tenant shall " be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

A further possibility is that the tenant may have been a statutory tenant. It is well established that such a tenant cannot assign his interest (*Keeves* v. *Dean* [1924] 1 K.B. 685) so that the occupier can be dealt with as a trespasser. A statutory tenant can, however, sub-let part of the premises, provided the sub-letting was not forbidden by the terms of the pre-existing contractual tenancy (*Roe* v. *Russell* [1928] 2 K.B. 117). He cannot, however, sub-let the whole house, either as a whole or piece-meal. If he does so, proceedings can be brought against him to determine his statutory tenancy under para. (*a*) of Sched. I to the 1933 Act, if the sub-letting were forbidden by the pre-existing contractual tenancy, or under para. (*d*) of the same Schedule whether it was so forbidden or not. If the sub-letting would have been *lawful* under the contractual tenancy, then the sub-tenant is again protected by ss. 5 (5) and 15 (3) of the 1920 Act, and in either case the granting of an order is subject to the overriding consideration of " reasonableness."

What is the position of a sub-tenant of a house or part of a house which is itself outside the Rent Acts? *Wright* v. *Arnold* [1947] K.B. 280 makes it clear that the sub-tenant of such part is not protected at all by the Acts. This principle was recently affirmed by the Court of Appeal in *Cow* v. *Casey* (1948), 152 E.G. 482. If there was neither an assignment nor a sub-letting, then the occupier is a mere licensee and, on the tenant's interest being determined by a notice to quit, he becomes a trespasser and can be ejected as such (*Cumberland Investment Co.* v. *Wood* (1946), Estates Gazette Digest 193: see 93 SOL. J. 9 for a full discussion of

the position of a licensee). Finally, if the house has been sub-let *furnished* to the occupier, the latter is not protected, even though the house was let to the tenant unfurnished (see *Prout* v. *Hunter* [1924] 2 K.B. 736 and proviso (1) to s. 12 (2) of the 1920 Act, which states "This Act shall not . . . apply to a dwelling-house *bona fide* let at a rent . . . which includes payments . . . in respect of use of furniture").

A provision which might prevent the occurrence of some of these difficulties, if it were more widely known, is s. 5 (4) of the 1933 Act and Sched. I to the 1939 Act, which makes it an offence to fail to supply the landlord with details of a sub-letting within fourteen days, if the sub-letting is such that it constitutes itself "a dwelling-house to which the principal Acts apply."

G. H. C. V.

Taxation

THE DEATH DUTIES: HUNTERS AND HUNTED—III

IMPERFECT GIFTS—TRANSFER OF SHARES

THE first article of this series dealt with the subject of gifts *inter vivos*. It was stated that, in the case of a gift of shares in a company, the gift has been perfected, at all events for death duties purposes, if an executed transfer and the share certificate have been handed over to the donee, but not yet registered with the company, at the time of the donor-transferor's death. A reader has raised the question as to how far this rule is subject to exceptions. The general rule is that a donor must have done all that he can legally to transfer the property, and have placed his gift beyond his power legally to recall it, and that the donee (or someone for him) must have been given actual enjoyment or possession to the complete exclusion of the donor. In the following circumstances the court held that the gift was imperfect. In *Re Fry, National Executors & Trustees Corporation, Ltd.* v. *Fry* [1946] Ch. 312, a donor resident abroad executed a deed of transfer of shares to his son resident here, and handed over the share certificate. The transferor being resident in the U.S.A., the company was prohibited by our defence regulations from registering the transfer without the Treasury's consent, and such consent, although applied for by the transferor and transferee, had not been obtained before the transferor's death, and consequently the transfer could not be registered by the company before the death. The summons was to determine (in brief) whether the gift had been completed before the death. The court held that it had not been completed because (1) the company was prohibited by the defence regulations from registering the transferee, and (2) the donor had not done all that was necessary to divest himself of his equitable interest in favour of his son. But it seems perfectly clear that the court assumed that if the donor *had* been resident here, and consequently no Treasury consent had been called for, then the gift would have been good in spite of registration of the transferee not having taken place. In his judgment Romer, J., quoted *Holt* v. *Heatherfield Trust, Ltd.* [1942] 2 K.B. 1, which decided that an assignment of a debt by A to B is good against A notwithstanding that notice has not been given to the debtor. It is not the assignor's duty to give the notice, but the assignee's, and A has done all that he is required to do when he has handed to B a proper assignment of the debt. In *Re Fry*, Romer, J., based his conclusion against the efficacy of the transfer solely on the ground that it was illegal for the company, in the special circumstances, to register the transferee, and his lordship stated that he arrived at such conclusion "with regret." With all respect, the correctness of this decision is doubted, for it is difficult to see what more the donor could possibly have done to divest himself, and he had written letters putting beyond doubt what his intentions were, and had made every effort called for to obtain consent, which it seems would shortly have been forthcoming. He could only have stopped the transfer going through by writing to the Treasury giving the lie to his already-made application for its consent and stating reasons why the Treasury ought to withhold it!

The articles of some private companies contain a provision which makes express consent by the board necessary before any transfer can be registered. If in such a case a donee-transferee, holding an executed transfer to him and the donor's share certificate, fails to obtain the board's consent to registration before the donor dies, it would follow, perhaps, from *Re Fry* that the gift failed—even if the board passed the transfer at a meeting held on the day following the death. But there seems to be scope for distinguishing the cases on the ground that in the *Fry* case the company was absolutely forbidden by the defence regulations from registering the transferee at the date of the death, whereas in our supposed case the board could do as it liked. But it may be that if the donor was himself a member of the board, and as such could blackball the transfer, a court would hold the gift imperfect if the board's consent had not been obtained at the date of the donor's death. These are, however, not very common cases, and in a more ordinary one no such complication arises.

The case of *Re Nelson, deceased* (1947), 91 SOL. J. 533, is most interesting. The company was a private one in which A and his father were the only shareholders and directors, the father being chairman. In September, 1945, A executed a deed of gift and a transfer of 20,000 shares in the company to his wife. In December, 1945, negotiations were opened by A and his father with a third party for the sale of all the shares in the company, and for that reason registration of the transfer to the wife was postponed, to save the stamp duty. A died in March, 1946, with the transfer still unregistered, and in May the widow presented the transfer to the company for registration, and registration was refused (a second director had been appointed in A's place). The company's articles contained the usual restrictions on transfers to persons not already members of the company and authorised the board to refuse registration to a person (not already a member) of whom they should not approve, so that A could have stopped registration right up to the time of his death in his capacity as director. A's will appointed his wife and three other persons his executors.

Sir John Bennet, Vice-Chancellor of the Chancery of Lancaster, held that the gift had not been completed in A's lifetime, but was perfected as at the date of death by the appointment of the donee as one of the executors. It is clear that the same applies even where the donee is appointed (by the court) administrator of the donor's estate (*Re James* [1935] Ch. 449). But such post mortem completion of a gift does not help with death duties. The deceased was still "competent to dispose" at his death. The duties are payable out of his residuary estate, and *not* by the donee; the widow in *Re Nelson* was therefore fortunate, for if the gift had been perfected before the death the estate duty would have fallen upon her.

The same principles apply to a transfer of registered land, the executed transfer and land certificate being handed to the donee, but not registered at the donor's death, and to a transfer of stock requiring registration at the Bank of England. A further point made abundantly clear by *Re Fry* is that the courts will not help an intended donee to complete his title by treating the donor's actions as amounting to a declaration of trust, unless it is certain that this mode of benefaction was intended. Here it was contended by counsel that if the transfer failed to pass the legal estate in the shares, yet the equitable estate had passed by reason of an express or implied declaration of trust, but the point failed. It was obvious that the donor's intention was to employ the method of transfer by deed, and not a declaration of trust. Failure in his use of the one chosen is no evidence in favour of the other, but the contrary.

The five-year immunity for estate duty begins to run when the gift was perfected. If that took place within five years before the donor's death, so that estate duty becomes payable, the duty falls on the donee; but no legacy or succession duty is attracted even if perfection takes place immediately prior to the death, and that will, with the general run of companies, and in normal circumstances, be the date on which the executed transfer and share certificate was handed over to the donee or to his agent or trustee on his behalf.

Gift or Purchase?

If A transfers his property to B in consideration of an annuity granted by B to A of actuarial value equivalent to the property transferred, no duties will be payable on the transferred property on A's death, even if it was handed over within five years of the death, unless B was a relative of A, because the property passed to B by purchase for full value (Finance Act, 1894, s. 3). But if B was a near relative of A, estate duty *will* be payable on A's property because the Finance Act, 1940, s. 44, provides that the grant of an annuity by a "relative" shall not be regarded as consideration for the transfer of "A's" property, which is therefore dutiable as a voluntary disposition. The word "relative" is defined in the section and is restricted to near relatives.

If A, instead of transferring his property to B, pays for the annuity by giving B a bond for the purchase money, can the debt be deducted from A's estate under the Finance Act, 1894, s. 7? No; if B is a "relative" the above section stops that, too. The said s. 44 of the Finance Act, 1940, has been relaxed by s. 40 of the Finance Act, 1944, so that a set-off against the value of A's property can be made in respect of the annuity payments actually made to him by A in so far as the total of such annuity payment exceeds the total amount received by B from the income (or notional income) over the same period derived from the property transferred to him by A. Reference to the Act of 1944 and Sched. III thereto will indicate how such amounts, or notional amounts, fall to be calculated.

In the next article it will be considered to what extent some transactions on the borderline between sale and gift are or are not exempt from duties, and in particular family business partnerships under which substantial assets pass to a surviving partner on death.

H. A. W.

Company Law and Practice

75 PER CENT. MAJORITY

Much surprise has been caused in legal circles recently by a widely-circulated proposition to the effect that in order to pass a resolution as a special or extraordinary resolution it is necessary to obtain in favour of the resolution 87½ per cent. or more of the votes cast rather than 75 per cent. or more as has always been assumed to be the case. The origin of the proposition is not clear, although it is understood that a lecturer at a recent series of lectures conducted under the auspices of the Chartered Institute of Secretaries has asserted that as a matter of law the proposition is correct.

A scrutiny of the wording of s. 141 of the Companies Act, 1948, indicates that as a matter of pure construction the words employed are not only quite capable of being construed in favour of the 87½ per cent. theory, but do in fact support that theory, if construed in their normal colloquial meaning. In order to pass a resolution as a special or extraordinary resolution, there must be in favour of the resolution "a majority of not less than three-fourths" of such members as, being entitled so to do, vote on the resolution (or in the case of a poll "a majority of not less than three-fourths" of the number of votes cast for and against the resolution). Now clearly the phrase "majority of one" means that the number of votes in favour exceeds the number of votes against by one, and, if the same meaning is to be attached to the word "majority" in s. 141, it follows that the number of votes in favour of the resolution must exceed the number of votes against the resolution by a number which is not less than 75 per cent. of the total number of votes cast. A simple mathematical calculation on this basis shows that in order to obtain this majority it is necessary that not less than 87½ per cent. of the votes cast should be in favour of the resolution.

The meaning that has always been applied to the phrase "majority of not less than three-fourths" is, of course, that there must be a majority of persons (votes) in favour of the resolution and that the number of such persons (votes) must not be less than 75 per cent. of the total number of persons (votes) to be taken into account. In other words, it is assumed that the word "majority" refers to the persons (votes) in the majority rather than to the number by which they exceed those in the minority.

A comparison of s. 141 of the 1948 Act with s. 117 of the 1929 Act shows quite clearly (and reference to s. 5 (5) of the 1947 Act confirms) that the changes in wording are not such as to introduce some new interpretation of the phrase "majority of not less than three-fourths," and it follows that, if the 87½ per cent. theory is correct now, a similar position existed under the 1929 Act. Tracing further back, it will be found that under both the 1908 Act and the 1862 Act, to which reference will be made later, a similar position would in the same way have existed.

It is so universally accepted that 75 per cent. for and 25 per cent. against is a three-fourths majority that, so far as can be seen, few text-books on company law regard it as necessary to define what is meant in the Act by "a majority of not less than three-fourths" and careful research has not enabled the writer to trace any case in which the meaning of the phrase has been in dispute. In Gore-Brown (40th ed., p. 498), words are used clearly disagreeing with the 87½ per cent. theory. In "The Companies Act, 1947" by Magnus and Estrin, the authors stated (p. 91) that "if the number of votes 'for' exceed the number of votes 'against' by a three-quarter majority, the resolution is carried." Clearly the words quoted follow the 87½ per cent. theory, but, unfortunately, the authors went on to give a numerical example ending "the number of votes cast in favour of the resolution is 2,100 and the number of votes cast against is 700, that is to say, that of the total number of votes cast for and against the resolution, namely 2,800, 2,100 or a three-quarter majority have been cast for the resolution and the resolution is therefore carried." In the new edition of this book (based on the 1948 Act) the discrepancy has been corrected by amending the words first quoted so as to conform with the numerical example; the authors have obviously therefore applied their minds to, and discarded, the 87½ per cent. theory.

Although no case has been traced in which the meaning of the phrase "majority of not less than three-fourths" has been in dispute, the point is dealt with (*obiter*) in *Re Gold Company* (1879), 11 Ch. D. 701, at p. 704, where, in the course of his judgment, Malins, V.-C., referring to the voting upon a special resolution, indicates that 11 votes for and 2 against having been cast (N.B., the learned judge disregarded four people present but not voting) the requisite majority under s. 51 of the Companies Act, 1862, had been obtained. The relevant part of s. 51 reads as follows: "... shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members ..." It will be seen that the wording of s. 51 is, so far as is material for the purpose of the argument, identical with s. 141 of the 1948 Act and also that, as eleven votes out of thirteen represent only 84.6 per cent. of the total, Malins, V.-C., did not regard the 87½ per cent. theory as correct. In the absence of any more direct authority, it would seem that the case quoted should be accepted by the court as at least a persuasive authority on the point, although it is not a very

satisfactory case and the decision did not turn on the point in question.

Although it is not conclusive, a strong argument against the 87½ per cent. theory can be drawn from reg. 4 of the 1948 Table A (Part I), which provides that rights may be varied with the consent in writing of the holders of three-fourths of the issued shares of the class concerned or with the sanction of an extraordinary resolution of the holders of such shares. If the 87½ per cent. theory is correct it is possible to have the position that at a well-attended meeting over 75 per cent. of the holders of all the shares concerned could vote in favour of an extraordinary resolution without the necessary majority being obtained and yet those holders by consenting in writing could nevertheless authorise the variation of rights. Clearly it is assumed that 75 per cent. of all the shareholders concerned could pass an extraordinary resolution even if opposed by all the remaining 25 per cent. Regulation 3 of the 1929 Table A and reg. 4 of the 1908 Table A contained a corresponding provision.

It is unfortunate that no conclusive authority can be found to dispose once and for all of the 87½ per cent. theory. However, it has been accepted universally both among practitioners and in judicial circles for many years that, if 75 per cent. of the total votes cast are cast in favour of a special resolution, the resolution is duly carried, and there seems no reason to doubt that if the matter ever comes up for judicial decision, the 87½ per cent. theory will be summarily dismissed.

J. W. M.

A Conveyancer's Diary

SETTLEMENTS VOIDABLE IN BANKRUPTCY

WHENEVER title is derived under a voluntary conveyance there is always need for careful investigation, but it does sometimes happen that requisitions are raised which go beyond the limits of discretion. The point which I have in mind arises under s. 42 (1) of the Bankruptcy Act, 1914, the effect of which can be summarised as follows. A voluntary conveyance of any property (with certain exceptions not immediately material) is void against the trustee in bankruptcy of the transferor if the transferor becomes bankrupt either (*a*) within two years of the date of the conveyance, or (*b*) within ten years of that date, unless in the latter case it can be proved that the transferor was, at the time of the conveyance, able to pay all his debts without the aid of the property comprised in the conveyance and that his interest in such property passed to the transferee on the execution of the conveyance. (This subsection speaks not of a conveyance of property, but of settlements, and the person referred to above as the transferee is there called the trustee of the settlement; but having regard to subs. (4), the provision applies to a simple voluntary conveyance just as it does to a settlement of property.)

Now suppose that an abstract discloses that A, more than two and less than ten years ago, has made a voluntary conveyance of the premises to B, the present vendor. In certain circumstances this voluntary conveyance can be upset and the premises recovered by A's trustee in bankruptcy, and the almost spontaneous reaction of someone called upon to investigate the title on behalf of B is to ascertain whether, in fact, these circumstances exist in this particular case. One important element in the inquiry is A's solvency at the date of the conveyance in question, since if that can be proved there can be no question of avoiding the conveyance in favour of the trustee in bankruptcy (if any). And so out goes a requisition asking whether, at the date of the conveyance, A was able to pay all his debts without recourse to the premises.

This practice is not uncommon, but it is wrong. A requisition of this nature is at the very least otiose, and at the worst dangerous. The reason for this is that the courts have construed the word "void" in this section as "voidable," with the consequence that any person who derives title under a voluntary conveyance, but is himself a *bona fide* purchaser for value without notice, obtains a good title to the property as against the trustee in bankruptcy. This was decided in *Re Carter and Kenderdines' Contract* [1897] 1 Ch. 776, a decision which is duly noted, but not, perhaps, sufficiently emphasised, in the books.

In this case, the decision, which was that of the Court of Appeal, rested on the fact that at the date of the vendor and purchaser summons no trustee in bankruptcy of the voluntary transferor had been appointed, and it was considered contrary to plain common sense to say that the voluntary conveyance could in any circumstances be void against the trustee in bankruptcy before such a trustee had been appointed. The conveyance was void against the trustee not *ab initio*, but from the date when the trustee's title accrued to him, i.e., the date of the available act of bankruptcy to which the trustee's title in the usual way relates back.

The position of the *bona fide* purchaser for value without notice in this connection is, perhaps, most happily summarised in the judgment of Vaughan Williams, J., in *Re Brall* [1893] 2 Q.B. 381, when he said that, from the moment it is assumed that a conveyance of this kind is voidable only and not void, all the authorities decided under the provision which now appears as s. 173 of the Law of Property Act, 1925 (which renders voidable dispositions made with intent to defraud a purchaser), apply to the case; and the result of the earlier decisions is that a purchase for valuable consideration from a person making title under a voluntary conveyance relates back so as to prevent the original conveyance being a voluntary conveyance for the purposes of the provision in question. This decision was expressly approved in *Re Carter and Kenderdines' Contract, supra*, and has not been questioned since.

The principle of these decisions was carried one stage further in *Re Hart* [1912] 3 K.B. 6, where it was held that even where the voluntary transfer was made after the transferor had committed an available act of bankruptcy, the trustee in bankruptcy had no title to the property transferred to a purchaser for value without notice of that act of bankruptcy. As was pointed out in the judgments of the Court of Appeal, no purchaser of shares on the Stock Exchange would be safe if his purchase could be reopened by the trustee in bankruptcy of a previous transfer (or transferor) under some voluntary settlement or conveyance, irrespective of notice.

The result of these decisions is that, in the ordinary case, the prospective purchaser for value of real property should raise no requisitions with reference to s. 42 of the Bankruptcy Act, 1914, which may tend to affect him with notice of matters of which he is ignorant, since lack of notice will give him all the protection he requires. This will be the case where no petition in bankruptcy has been filed at the date of the purchase in connection with which investigation is being carried out. If a petition has been filed by that time, the position is now rather different, since it is almost certain that it will have been registered as a pending action under s. 2 (1) of the Land Charges Act, 1925, and to that extent the circumstances which existed in *Re Hart, supra*, are not likely to be repeated if the subject-matter of the conveyance in question is land. Such a situation is not, however, quite impossible even at the present time, since under s. 3 (1) of the Act of 1925 a pending action does not bind a purchaser for value without express notice thereof unless it is for the time being registered as a land charge. Where, therefore, in a case concerning land there is no pending action registered against any of the estate owners for the time being against whose names it is necessary, according to the normal practice, to search, it is at least possible that the sort of inquiry mentioned above may be positively dangerous, since it may

deprive the purchaser of the protection he is otherwise entitled to both under the Act of 1925 and under the Bankruptcy Act, 1914, as construed by the courts. In regard to the transfer of personalty, the Act of 1925 has, of course, no application at all.

A final point on this question: once the abstract has disclosed a transfer for value (e.g., if the voluntary conveyance which forms a link in the title is a conveyance not to the immediate vendor, but to a predecessor in title of the vendor) any danger of a subsequent purchaser for value being affected with notice of any such matter as is discussed above becomes slight. The protection which has always been available in equity to a purchaser for value without notice is also available to a person claiming under such a purchaser, so that a purchaser with actual notice will still take free of the matter of which he has notice if some predecessor purchased for value without notice. This is an equitable doctrine, and the cases in the books deal with its application to notice of equities, such as restrictive covenants; but in his judgment in *Re Hart, supra*, Cozens-Hardy, M.R., relied upon a passage from *Wilkes* v. *Bodington* (1707), 2 Vern. 599, in which the principles on which equity applies the rule as regards purchase without notice were laid down in broad terms, and it is clear that his decision proceeded on equitable principles. It is a fair inference from this passage that the protection accorded a subsequent purchaser, once a purchase for value without notice is found as a link in the title, is equally available whether the matter of which notice is acquired is a mere equity or a statutory right.

"A B C"

Landlord and Tenant Notebook

NET ADHERENT GOODWILL

THE writer of the article entitled "*Felis Domestica*" in our issue of 15th January (93 SOL. J. 38) referred to a considerable variety of such animals: both to actual specimens, which have figured in leading cases, and to sundry felines created by poets and other writers of fiction. If he failed to mention the cat used to illustrate net adherent goodwill which may entitle a tenant of business premises to compensation for loss of goodwill under the Landlord and Tenant Act, 1927, there were at least two good reasons for the omission: its creator was not a writer of fiction, and Evershed, L.J., in his judgment in *Mullins* v. *Wessex Motors, Ltd., infra*, had expressed the hope that this particular cat had lived the last of its reputed nine lives and might now be decently interred.

Ever since the Landlord and Tenant Act, 1927, was passed, those advising shopkeeper tenants have often had great difficulty in explaining to their over-sanguine clients the difference between local goodwill and personal goodwill, and that between local goodwill that may and local goodwill that cannot entitle them to compensation or new leases. A client with a classical education might be made to appreciate the first difference by being reminded of that between *lares* and *penates*; but these are rare, and it was for the benefit of practitioners dealing with the majority that a text-book writer introduced the illustration by reference to cats, dogs, and rats. "The cat prefers the old home to the person who keeps it . . . represents that part of the customers who continue to go to the old shop, though the old shopkeeper has gone; the probability of their custom may be regarded as an additional value given to the premises by the tenant's trading. The dog represents that part of the customers who follow the person rather than the place . . . There remains a class of customer who may neither follow the place nor the person, but drift away elsewhere. They are neither a benefit to the landlord nor to the tenant, and have been called 'the rats' for no particular reason except to keep the epigram in the animal kingdom." These passages explaining the analogy are from the judgment of Scrutton, L.J., in *Whiteman Smith Motor Co.* v. *Chaplin* [1934] 2 K.B. 35; but more to the point, for present purposes, was the criticism levelled by Maugham, L.J., in the same case.

The facts were as follows. In 1919 the plaintiffs took over a lease, for an unexpired term of nearly fourteen years, of premises in which they (as their predecessors in title had done) carried on the business of a motor garage with repair works and petrol filling station. In 1932 they notified the landlord (who died during the proceedings, the defendants being substituted) of a claim for a new lease, alternatively, for compensation for goodwill, under the Landlord and Tenant Act, 1927. The rent had been £450 a year, and a premium of £225 had been paid. The valuers, called by both parties, agreed that this corresponded to a rent of £500 a year. They also agreed (to Scrutton, L.J.'s astonishment) the highest rental figure which any tenant would give as being £550, which the plaintiff was prepared to pay; but the valuer who gave evidence for the landlords added that all rental values in the particular neighbourhood had increased. The referee, having heard evidence of profits made and having capitalised them, finally arrived at the conclusion that no compensation was payable. He reached it by a process of reasoning which Scrutton, L.J., did not, and I will not try to, follow. The county court judge adopted the report. The Divisional Court (the learned lords justices were sitting as such) allowed the appeal, pointing out, *inter alia*, that profits, which might depend very largely on personal qualifications, were but a slight guide to the value of adherent goodwill, valuation of which must often be made by an intelligent guess. What has to be arrived at is the difference between the value of the reversion if the landlord were to let the premises for the purposes of the same business and its value if let without the goodwill. And the division into cat, dog and rat values was of little value except as an illustration, and might be misleading, said Maugham, L.J. For a tenant could advertise and circularise old customers if he did not go far; and, what was more important, the so-called "cat" goodwill must in large and uncertain measure be due to *the site* of the premises. "If the cat metaphor is to be used, I would say that the cat may be attracted away by a gentle stroke on the back and the promise of a bowl of milk. But really there should be a fourth animal, the rabbit, to indicate the customers who simply come from propinquity to the premises . . . I regard the arbitrary division . . . into cat, rat and dog goodwill as valueless unless all sorts of qualifications are made." This passage may, indeed, remind readers who have sought to use the illustration of the type of client who at once objects that her particular cat never manifested any *animus revertendi*, or that this could be overcome by applying butter (a blindfold test might or might not show that margarine would do) to the paws; but the real point of the learned lord justice's objection was that the analogy, by suggesting that "site goodwill" was the same thing as the goodwill stipulated by the Act, was deceptive. For the goodwill entitling the tenant to compensation must have become attached to the premises by reason of the carrying on at the premises of a trade or business, and what may be due to improved transport facilities or increase of population or similar extraneous causes must be ignored.

This was emphasised by *Mullins* v. *Wessex Motors, Ltd.* (1947), 63 T.L.R. 610 (C.A.), in which the claim was by an antique dealer who had held a twenty-one year lease of premises consisting of a shop and living accommodation, at an annual rent of £208. There was evidence that the annual profits for the period from 1935 to 1938 were a sum not exceeding £656. In May, 1940, the claimant, his business seriously prejudiced by the war, sub-let a large part of the premises to "Naafi," for the rest of his term less one day. Later during the war further sub-leases were granted to the same institute, with the result that from March, 1942, onwards the tenant retained only about one-tenth of the house for habitation

and business, and received £565 a year in rents from the sub-tenants (who also paid the rates on the parts sub-let). A surveyor testified that there was "cat goodwill" to the extent of some £350 to £400 less the £208 and allowing for an 80 per cent. general increase in rentals, and another antique dealer deposed that he would be willing to pay £400 a year for the premises.

The respondents gave evidence that they required the house for the purposes of their own business, and the referee held that the goodwill said to be adherent, being that of an antique dealer, was of no use to them and that they were therefore not liable. The county court judge disagreed with this interpretation of the Act, and rightly so, as the Court of Appeal held; but then found that added goodwill had increased the letting value of the premises by £97 per annum and awarded the applicant £485, i.e., five years' purchase. In so doing, he rejected as irrelevant the evidence that the sub-tenants had for close on five years been in occupation of the greater part of the premises at a rent of £565 which, even when reduced to allow for the piecemeal sub-letting, was still as great as the enhanced letting value for the business of antique dealing. He also rejected evidence of pre-war profits. The Court of Appeal held that he was wrong on both these points, especially in disregarding the evidence concerning the sub-lettings, and, while there had been some evidence of adherent goodwill, this was a case in which the appellate tribunal could and should draw its own inferences and reverse the judgment rather than order a new trial.

Neither the evidence of the surveyor nor that of the other antique dealer had, Evershed, L.J., pointed out, proved how much of the alleged goodwill was adherent goodwill qualifying the tenant for statutory compensation, and the court had made the mistake of including or confusing goodwill attributable to the site with goodwill attributable to the carrying on of the business on the site. And this occasioned the valediction cited at the end of my first paragraph.

A court may in certain circumstances, namely, when granting relief against forfeiture for non-payment of rent, be said to revive an expired lease (see the Common Law Procedure Act, 1852, s. 212: ". . . without any new lease"); but there is no provision for re-animating a nine times deceased cat. It is however, permissible to mourn our loss, and also, as was suggested by Maugham, L.J., in *Whiteman Smith Motor Co.* v. *Chaplin*, *supra*, to continue to use the animal kingdom epigram as an illustration, carefully guarding against the risk that invariably accompanies the use of analogies and figures of speech. We may remind ourselves how the youthful Jeremy Bentham, attending Blackstone's lectures, was not so impressed as might have been expected by the great man's reasoning when he explained the devolution of realty by attributing to land the properties of water, which went down but not up. Which showed that one undergraduate could appreciate the difference between a metaphor and an argument!

R. B.

HERE AND THERE

FOOTNOTE TO FROG MONEY

WHEN I noted recently the village frog currency revealed in a West Country county court action, I did not realise that it was only another case of nature imitating art. Now I have just found it in John Steinbeck's three-year-old novel "Cannery Row." Place: Monterey in California. Characters: (1) Doc runs Western Biological Laboratory where men of science can buy all living things from octopuses to rattlesnakes or tom-cats; (2) Lee-Chong keeps the general store; (3) Mack and "the boys" idle, amiable, disreputable, feckless, living by their wits without visible means of support. In Doc's absence they have collected several hundred frogs for him. Now read on: "'We're in the chips,' Mack said enthusiastically. 'Doc pays us a nickel a frog and we got about a thousand.' Lee nodded. The price was standard. Everybody knew that. 'Doc's away,' said Mack '. . . you know the price of frogs is twenty for a buck. Now Doc is away and we're hungry. So what we thought is this. We don't want to see you lose nothing, so we'll make over to you twenty-five frogs for a buck. You got a five-frog profit there and nobody loses his shirt . . . We will actually deliver right into your hands twenty-five frogs for every buck of groceries you let us have . . .' Lee nosed over the proposition . . . He could find nothing wrong with it . . . Frogs *were* cash as far as Doc was concerned, the price was standard and Lee had a double profit . . . He stipulated, however, that he would take no dead frogs. Now Mack counted fifty frogs into a can and got two dollars' worth of bacon and eggs and bread . . . Eddie sauntered down and bought two frogs' worth of Bull Durham. Jones was outraged a little later when the price of Coco-Cola went up from one to two frogs. In fact bitterness arose as the day wore on and prices went up. Steak, for instance—the very best steak shouldn't have been more than ten frogs a pound, but Lee set it at twelve and a half. Canned peaches were sky-high, eight frogs for a No. 2 can. Lee had a stranglehold on his consumers. He was pretty sure that the Thrift Market or Holman's would not approve of this new monetary system. If the boys wanted steak, they knew they had to pay Lee's prices." And now, since you're burning to know how the deal ended, go and buy the book—it's well worth it.

TALLY-HO

LEGISLATORS or promoters of legislation who prefer their blood-sports at second hand (in *Hamlet* or *The Duchess of Malfi* or some of the gorier Hollywood productions) seem somewhat surprised at the strength of the countryman's reactions to current proposals to outlaw his normal recreation with gun or rod or hound. When those concerned (and that means country people) really do revolt against John Peel and all that, the ordinary law of trespass will be quite equal to coping with the situation, for the huntsman is no more privileged than anyone else to trespass *vi et canibus* and commit damage. In England at any rate we know nothing of the "*Lex Tallyhonis*" invoked on the spur of the moment by the great John Curran when an unaccommodating farmer challenged him, in the middle of a hunt, to say by what law he was trespassing on his land. Still, the jolly huntsman is not yet an outlaw here and, in the even scales of justice, may still be adjudged damages by the thousands if libelled in his calling (*vide Williams* v. *Craven-Sands* at the Bodmin Assizes).

HOW CULTURED ARE YOU?

KEEPING my eye on the newspapers during the past few weeks I have noticed some rather peculiar items—such stuff as quizzes are made of. Let us have a quiz. No prizes are offered.

(1) "A pound of beef, a pound of potatoes, a pound of white bread and a pint of strong beer." (*a*) Breakfast for Chaucer's serjeant-at-law? (*b*) Newgate Prison rations for Queen Victoria's Coronation? (*c*) Commons in Middle Temple Hall in 1913?

(2) The figure in one of London's most charming statues was a solicitor's clerk. It is in (*a*) Kensington Gardens? (*b*) Middle Temple Gardens? (*c*) Piccadilly Circus?

(3) Selling by retail a packet of peanuts is punishable by a fine of £500 or one year's imprisonment. (*a*) Is or was this true in 1649, 1849 or 1949? (*b*) In Moscow, Madrid or London?

(4) From a daily paper: "A protestation of love by a former Japanese Finance Minister Izumiyama to a woman M.P. during the Budget debate has resulted in his resignation, a challenge to a duel and a court suit. Izumiyama is said to have bitten Mrs. Yamashita on the cheek as she walked in a corridor of the Diet building saying, 'I love you. I don't care what happens to the Budget.' Now two members have had words over Izumiyama's resignation. One of them threw down a glove—the other, a Liberal, answered by filing a court suit, saying, 'It is more democratic'." (*a*) Beachcomber in the *Daily Express*? (*b*) Timothy Shy in the *News Chronicle*? (*c*) News item in the *Daily Mail*?

Answers: (1) Newgate coronation rations; (2) Piccadilly Circus (Eros); (3) True in 1949 in London; (4) News item in *Daily Mail*.

RICHARD ROE.

Mr. G. S. Martyn, solicitor, of Chester, formerly of the firm of Potts, Martyn & Co., Chester, is retiring from the firm of Ouseley-Smith & Co., Chester. Mr. Martyn was admitted in 1900.

Mr. R. T. D. Stoneham, solicitor, of Cannon Street, E.C 4, has been elected chairman of the City of London Lands Committee, an office which carries with it the title of Chief Commoner.

NOTES OF CASES

HOUSE OF LORDS

NEGLIGENCE: DOCKER INJURED BY DEFECTIVE TRAY

Johnstone *v.* Clyde Navigation Trustees and Others

Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid. 16th December, 1948

Appeal from the Court of Session, Second Division.

The plaintiff, an employee of the second defendants, was engaged in the unloading of a ship at Glasgow when, as a tray was being lifted by a crane, a keg fell off it and injured him. His allegation of faulty management of the crane was denied by the first defendants, who contended that the accident was due to the negligence of the second defendants in providing a defective tray. The plaintiff amended his statement of claim to bring in the employers as second defendants, adopting the first defendants' allegations of negligence against them. The Lord Ordinary held that the plaintiff had failed to prove his case against either of the defendants. The Court of Session affirmed that decision, and the plaintiff now appealed, abandoning his case against the first defendants. The House took time for consideration.

LORD SIMONDS—the other noble lords concurring in dismissal of the appeal—said that there was no evidence that the practice of the second defendants fell short of what was done by other stevedores, or that the circumstances called for greater precautions. The mere fact, if it were a fact, that a defective tray was used proved nothing against those defendants. Their system of inspection and discarding from use might have been all that it should be, and yet a defective tray might have been used on a particular occasion through the negligence of the appellant or of his fellow workmen, for neither of which those defendants would have been liable. Appeal dismissed.

APPEARANCES: *Walker*, K.C., and *Leechman* (*O. H. Parsons* for *Herbert Macpherson*, S.S.C., Edinburgh, and *L. & L. Lawrence*, Glasgow); *Cameron*, K.C. (*Dean of the Faculty*) and *M'Lean* (*Ince, Roscoe, Wilson & Griggs*, for *Hunter, Harvey, Webster and Will*, W.S., Edinburgh, and *Wright, Johnston & Mackenzie*, Glasgow); *M'Kechnie*, K.C., and *M'Donald*, K.C. (*Thomas Cooper & Co.*, for *J. & A. Hastie*, S.S.C., Edinburgh, and *Charles Fraser*, Glasgow).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

E.P.T.: DEDUCTIONS: "INCOME FROM INVESTMENTS"

Tootal Broadhurst Lee Co., Ltd. *v.* Inland Revenue Commissioners

Lord Simonds, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid. 20th January, 1949

Appeal from the Court of Appeal.

The appellant company were manufacturers and merchants of cotton, linen, and woollen goods. In the course of manufacture they used patents covering inventions and processes mostly developed by their own research department, a permanent department employed largely for the perfecting of old, and the devising of new, processes. The company had from time to time granted non-exclusive licences to use a number of such patents to other manufacturers. They received royalties, in particular, from three groups of patents: (*a*) a crease-resisting process, devised in the company's research department, not used by the company themselves, but used by a subsidiary company on the appellant company's own products. (*b*) a process to prevent felting in woollen goods. The company had bought the patent rights in this process in 1939 from the original patentees, taking over the benefit and burden of the existing licences. They had since granted further licences, and used the process in the manufacture of its own goods; (*c*) controlling devices on stentoring machines. These governed the transit of cloth on conveyor belts. The patent was invented by a person connected with the company, and that person and the company assigned the patent for a royalty amounting in the year in question to £150. Royalties from the other two patents in that year amounted to £100,000. None of the licences was exclusive or for the whole term of the particular patent. Excess profits tax was imposed by Pt. III of the Finance (No. 2) Act, 1939. By s. 14, profits are to be computed on income tax principles as adapted by the Act of 1939. The company did not fall within the businesses specified in para. 6 (2) of Pt. I of Sched. VII as covered by that adaptation. The Special Commissioners held that the patents in question were "investments" of the company, the royalties accordingly to be excluded from the assessment to excess profits tax. Atkinson, J., held that only group (*c*) constituted investments. On appeal and cross-appeal, the Court of Appeal held that none of the investments were patents. The company now appealed. The House took time for consideration.

LORD SIMONDS said that the decision of the Court of Appeal, founded as it was on its own decision in *I.R.C.* v. *Desoutter Bros., Ltd.* (1946), 62 T.L.R. 110, was undoubtedly correct. The context in which the word "investments" had to be construed was the distinction between the income from investments and the other profits of a trade. The problem could be solved by taking a schedule of the assets of the trading company concerned, omitting stocks and shares, to which in view of *Gas, etc., Co., Ltd.* v. *I.R.C.* [1923] A.C. 723, the title of investments could not be denied in any circumstances, and asking of each other asset whether it was one which the company had acquired and held for the purposes of earning profits in, or otherwise for the promotion of, its particular trade or business. Apart from a minority of borderline cases, the answer would be clear cut. Applying that test to the present case, the decision of the Court of Appeal was clearly right.

The other noble and learned lords concurred in dismissing the appeal. Appeal dismissed.

APPEARANCES: *Tucker*, K.C., *Donovan*, K.C., and *Graham-Dixon* (*Ellis, Peirs & Co.*); *King*, K.C., and *Hills* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL

TRAINER WARNED OFF: RIGHT OF ACTION

Russell *v.* Duke of Norfolk and Others

Tucker, Asquith and Denning, L.JJ. 8th December, 1948

Appeal from Lord Goddard, C.J. (92 SOL. J. 220; 64 T.L.R. 263).

The plaintiff was a trainer of racehorses. The allegation having been made that a horse for which he was responsible was drugged when it ran at a race meeting conducted under Jockey Club Rules, the defendants, the stewards of that club, held an inquiry, as a result of which they found that, while the trainer was entirely innocent of drugging the horse, he had been guilty of gross negligence. They therefore placed him on the list of disqualified trainers, thereby warning him off Newmarket Heath, and published that decision in their publication, the "Racing Calendar." The licence to the plaintiff to train horses during the material year, which was thus withdrawn, had been granted to him under r. 102 of the Jockey Club Rules, and he duly paid a subscription of £1 to a certain charity as prescribed by that rule. It was a written condition of the plaintiff's licence that it might be withdrawn or suspended by the defendants in their absolute discretion, and a withdrawal or suspension be published in the "Racing Calendar." The plaintiff's action for breach of contract was based on the allegation that the inquiry had not been fairly conducted. The libel complained of was the publication in the "Racing Calendar" of the defendants' decision. Lord Goddard, C.J., withdrew the case in libel from the jury. On the issue whether the inquiry had been fairly conducted, the jury were unable to agree. He gave judgment for the defendants on the question of law raised, and the plaintiff now appealed.

TUCKER, L.J., said that in his opinion the defendants had, under r. 17 of the rules of racing, an unfettered discretion to withdraw or suspend a licence without holding any inquiry at all. By r. 102 a trainer whose licence was withdrawn on the ground of misconduct was a disqualified person. But for r. 178 there would have been a great deal to be said for the argument that r. 102 postulated the holding of an inquiry before a finding of misconduct was reached. On a reading of the rules as a whole, however, it was impossible to imply into the contract between the parties the term for which the plaintiff contended, which was really contradictory of the idea of an absolute discretion. The publication in the "Racing Calendar" was privileged. It was a publication through the proper channel of matters of which it was proper to inform the racing public. Even if it was a term of the contract between the parties that there should be a fair inquiry, there was no evidence that the inquiry which had been held had not, in fact, been in accordance with the principles of natural justice.

ASQUITH, L.J., agreeing that the appeal failed, said that, in his opinion a charge of misconduct under r. 102 necessitated the holding of an inquiry; but there was no evidence that the inquiry held had been contrary to the principles of natural justice.

DENNING, L.J., agreed with Asquith, L.J.

Appeal dismissed.

APPEARANCES: *Roberts*, K.C., and *Geoffrey Howard* (*W. R. Bennett & Co.*); *Sir Valentine Holmes*, K.C., and *Elwes* (*Charles Russell & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DEBT INCURRED IN ENEMY-OCCUPIED TERRITORY: CREDITOR'S CLAIM

Boissevain *v.* Weil

Tucker, Asquith and Denning, L.JJ. 13th December, 1948

Appeal from Croom-Johnson, J. (92 Sol. J. 246).

In 1944 the plaintiff, a Dutch subject, lent the defendant, a British subject, 320,000 francs at Monaco, then in the military occupation of the enemy. The defendant gave the plaintiff as security three cheques drawn on a bank in England. The plaintiff claimed £6,000 as repayment of the debt. Croom-Johnson, J., after deciding other points in the plaintiff's favour, held, the defendant arguing that she had committed an offence under the Defence (Finance) Regulations, 1939, and that accordingly the transactions were prohibited and unenforceable, that regs. 2 and 3A prohibited transactions in currency, but that the handing over by the defendant of the three cheques was not such a transaction. He therefore gave judgment for the plaintiff. The defendant appealed.

Tucker, L.J.—Asquith and Denning, L.JJ., agreeing—said that the appeal was now confined to two points under regs. 2 and 3A of the Defence (Finance) Regulations, 1939, by which it was contended that the transaction was prohibited. By reason of s. 3 of the Emergency Powers (Defence) Act, 1939, and the Defence (Finance) Regulations, 1939 (as amended), regs. 2 and 3A, unless the contrary intention should appear, applied to British subjects wherever they might be (except in certain exempted territories); and, unless permission had been granted by or on behalf of the Treasury, the buying or borrowing of foreign currency was prohibited. The regulations showed no indication of an intention to the contrary. Their whole object was to protect sterling. He (his lordship) could not accept the plaintiff's argument that, on its proper construction, reg. 2 had no extra-territorial effect. The alternative contention for the plaintiff, that he should be entitled to recover on the principle of "unjust enrichment," failed. If accepted, it would lead to the curious result that the court would be enforcing a debt or obligation which by statute was expressly avoided. Appeal allowed.

Appearances: *Salmon*, K.C., and *Stenham* (*William Charles Crocker*); *Sir David Maxwell Fyfe*, K.C., and *B. M. Goodman* (*Pettiver & Pearkes*).

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

RENT RESTRICTION: TWO FLATS IN ONE DEMISE

Langford Property Co., Ltd. *v.* Goldrich

Lord Greene, M.R., Somervell and Singleton, L.JJ.

21st January, 1949

Appeal from Birkett, J. ([1948] 2 K.B. 423; 92 Sol. J. 443).

The plaintiffs were the landlords and the defendant the tenant of two flats on the same floor of a block of flats in London, at a rent which had risen to £525 a year. In May, 1947, the landlords gave due notice to quit, but the tenant claimed the protection of the Rent Restriction Acts. His right to that protection depended on whether the two flats constituted together a separate dwelling-house within the meaning of s. 16 (1) of the Rent, etc., Act, 1933. If they did, the question remained whether their rateable value exceeded £100 a year, the limit for controlled houses in the metropolitan police district, fixed by s. 3 (1) of the Rent, etc., Act, 1939, on the "appropriate day" (6th April, 1939: s. 7 (1)). On 24th March, 1940, the rateable values of the flats were reduced to £54 and £52 a year retrospectively as from 1st April, 1939. Birkett, J., made an order for possession, and the tenant now appealed.

Somervell, L.J.—Lord Greene, M.R., and Singleton, L.J., agreeing—said that he did not agree with Birkett, J.'s view that the two flats did not make up a separate dwelling-house within the meaning of s. 16 (1) of the Act of 1933. If the facts justified such a finding, two flats, indeed two houses, could be let as a separate dwelling within the meaning of the definition. *Sheehan* v. *Cutler* [1946] K.B. 339, and *Selwyn* v. *Hamill* (1948), 92 Sol. J. 71, which concerned the offer of alternative accommodation in two separate houses, raised different considerations. Next, he (his lordship) could not accept the contention for the tenant that, when the two flats were first let together, a new rateable hereditament came into existence, the rateable value of which was presumed, in the absence of evidence of rateable value (see Rent, etc., Act, 1938, s. 7), to be within the Rent Act limit. In his opinion, where two flats let together were shown in the valuation list as separately rated hereditaments, the rateable value of the dwelling-house thus constituted was the sum of the two rateable values shown in the list. If that total value, as here, exceeded the rateable value prescribed by the Rent, etc., Act, 1939, on the appropriate day, it followed that the dwelling-house consisting of the two flats was outside the protection of the Acts. The argument must also be rejected that because there was let with the flats a garage, part of a block of garages duly rated, the garage itself never having had any sum apportioned to it as rateable value, therefore there was no ascertainable rateable value of the hereditament now let; for the ascertained rateable value of the two flats taken together remained.

Appearances: *Scott Henderson*, K.C., and *I. H. Jacob* (*Franks, Charlesly & Leighton*); *Beney*, K.C., and *Heathcote-Williams* (*Stikeman & Co.*).

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

E.P.T.: DEDUCTIONS: PURCHASE OF CROP OF CHERRIES

Inland Revenue Commissioners. *v.* Pilcher

Croom-Johnson, J. 18th January, 1949

Case Stated by the Income Tax Special Commissioners.

The respondent taxpayer, a fruit grower and salesman, in May, 1942, bought, at auction, for £5,500, part of an agricultural property including 17 acres of cherry trees bearing a ripening crop of cherries. The conveyance, which was executed in June, 1942, made no reference to the cherries. The conditions of sale provided that on completion the purchaser was to have the benefit of any growing crop, and the vendor in fact let him into possession for the purpose of watching, and then picking, the crop of cherries before completion of the sale had taken place. The Special Commissioners, not, so they stated, being satisfied that the crop of cherries was part of the freehold, made a proportionate deduction from the total of £5,500 paid for the land and allowed the sum deducted as an expense in computing the taxpayer's profits for excess profits tax purposes. The Crown appealed.

Croom-Johnson, J., said that there was no need for him to cite authority for the proposition that money spent in the acquisition of an asset in the nature of capital could not be deducted against profits. The leading authority on the point of capital expenditure not being an allowable deduction was *Coltness Iron Co.* v. *Black* (1881), 1 Tax Cas. 287. In *Hughes* v. *British Burmah Petroleum Coy.* (1932), 17 Tax Cas. 287, Finlay, J., after referring to the *Coltness* case, *supra*, said that there was no doubt about the law: the difficulty was to apply it to the varying facts of different cases. The present case was said to be different from those. It was argued that in the purchase price of £5,500 was included £x for the crop of cherries, and that that £x, as being the cost of stock-in-trade, namely, cherries, was deductible as an expense in the computation of profits. Cherries were said not to be a natural crop like apples, but *fructus industriales* like corn, and so not to have passed under the conveyance of the land. The Crown argued that the growing cherries passed as part of the freehold, and that they were a capital asset. Williams on Executors (11th ed., p. 540) clearly showed the difference between *fructus industriales* and *fructus naturales*, though modern horticulturalists might not agree that, under modern conditions, a crop of cherries for marketing was a natural crop of the earth. He (his lordship) did not see what difficulty the Special Commissioners had felt in finding that the cherries passed with the freehold. They could only have found that they were *fructus industriales* by misdirecting themselves in law. They were wrong in paying regard to the evidence that the taxpayer before buying the land had inspected the crop of cherries and made up his mind that it was worth £2,500. That was not the right approach for the Commissioners, and ran counter to the authorities. There was no evidence entitling them to hold that this was a purchase of stock-in-trade. It was simply a purchase of land which happened to have a growing crop on it. It was, on the face of it, the purchase of a capital asset. Appeal allowed. Case remitted.

Appearances: *Sir Andrew Clark*, K.C., *J. H. Stamp* and *Hills* (*Solicitor of Inland Revenue*); *Borneman* (*Winch, Greensted and Winch*).

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

INCOME TAX: "CHARITABLE PURPOSES"

Ellis and Others *v.* Inland Revenue Commissioners

Croom-Johnson, J. 26th January, 1949

Case Stated by Income Tax Special Commissioners.

The appellants were the trustees of a deed whereby a property was vested in them on trust, for purposes specified, with power to

erect, pull down or alter buildings on, and otherwise manage it. Purpose (*d*) was " generally . . . for the promotion and aiding of the work of the Roman Catholic church in the district as the trustees with the consent of the Bishop may prescribe." Clause 2 of the deed provided that the trustees should do nothing " inimical to the . . . Roman Catholic church." By clause 5 " the moneys to arise . . . in respect of any . . . dealing with the said property or the rents and profits thereof shall . . . be applied . . . as capital or income for such purposes in connection with the trust . . . or if the property shall be sold then either as capital or income for such purposes in connection with the promotion . . . of the work of the Roman Catholic church in the district . . . as shall be prescribed by the trustees with the consent of the Bishop." The trustees claimed for moneys arising from the trust property exemption from income tax under s. 37 of the Income Tax Act, 1918, as being " vested in trustees for charitable purposes " and " so far as the same are applied to charitable purposes only." The Special Commissioners disallowed the claim, and the trustees now appealed.

CROOM-JOHNSON, J., said that it was not contested that the deed was not charitable apart from purpose (*d*) and cll. 2 and 5. The question was whether, on a fair construction, those provisions authorised things to be done by the trustees which were other than charitable. The Special Commissioners had applied the tests laid down in *Dunne* v. *Byrne* [1912] A.C. 407; *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; *In re Jackson* [1932] 2 Ch. 389, and *In re Coats' Trust* [1948] Ch. 1, and came to the conclusion that the deed did empower the trustees to use the trust property for purposes other than charitable. It was argued for the trustees that no weight should be given to the words " in connection with " in cl. 5 because they did not enlarge the ambit of the preceding words. In *In re Davies* (1932), 49 T.L.R. 5, Lord Hanworth, M.R., had construed the words in a will " work connected with the Roman Catholic church " as adding something to the scope of the ordinary work of that church, and thus widening the choice of work open to the trustees. Jenkins, J., in *In re Eastes* [1948] Ch. 257, at p. 262, had apparently refused to follow *In re Davies, supra*. He (Croom-Johnson, J.) did not feel free to follow that course. It was argued for the trustees that the discretion given to the trustees at the end of purpose (*d*) was mere surplusage. He (his lordship) thought, however, that the prohibition in cl. 2 was rendered necessary by the latitude which purpose (*d*) might otherwise allow them. Again, full value must be given to every word in cl. 5. There again, a wide discretion was given to the trustees. The words " in connection with " appeared in that clause, though in none of the purposes, and the clause must be construed as having a wider meaning than it would have without them. A taxpayer had to discharge a heavy burden in order to secure exemption under s. 37 of the Act of 1918. In his (his lordship's) opinion there was nothing in the trust deed to show that the trustees could not lawfully and without breach of trust devote the trust funds to objects which were not charitable. Appeal dismissed.

APPEARANCES: *Scrimgeour*, K.C., and *Jopling* (*Biddle, Thorne, Welsford & Barnes*, for *Wake, Smith & Co.*, Sheffield); *Sir Frank Soskice*, K.C. (*Solicitor-General*), *J. H. Stamp* and *Hills* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

INCOME TAX: PURCHASE AND SALE OF FARM

Cooksey and Another *v.* Rednall

Croom-Johnson, J. 27th January, 1949

Case Stated by the Income Tax Special Commissioners.

In 1924 the appellant taxpayers bought a farm with the object of establishing a herd of Guernsey cattle. The project failed to materialise, whereupon they let the farm at £325 a year, regarding it as a good investment. In 1938 they sold the farm for £25,000, representing a handsome profit, having heard that a high price had been realised by a similar property in the neighbourhood. In 1924, a firm of solicitors, in which the taxpayer Cooksey was a partner, bought and developed by building three estates. In 1930 the two appellant taxpayers embarked on a partnership in connection with a building estate which they were engaged in developing until 1936. From 1933 to 1935 they bought three other estates in partnership, and in 1940 a fourth. Those were admitted to be trading transactions by the partnership, and tax on them had been assessed and paid. The respondent inspector of taxes assessed the appellant taxpayers to tax in respect of the sale in 1938 of the farm bought in 1924 on the ground that the purchase and sale were trading transactions. The Special Commissioners confirmed the assessment, and the taxpayers now appealed.

CROOM-JOHNSON, J., said that it was not evidence on which the Special Commissioners could find that the purchase of the farm was in the way of trade that each of the taxpayers had only subscribed £500 towards the purchase price in cash, the rest being raised by a mortgage. The evidence about the activities in buying land of the partnership between the taxpayer Cooksey and others from 1920 to 1925 was, again, no evidence on which the Commissioners could find that a joint venture for buying land existed between the two appellant taxpayers in 1924. The later trading activities of the two appellants in buying and developing land might have afforded the Commissioners the requisite evidence but for their clear finding that the two men had bought the farm for the purpose of occupying it and establishing a herd of cattle there; but those later activities could not be taken as contradicting that clear finding. The courts could not regard the activities of the two taxpayers from 1930 onwards as neutralising the facts, which they had accepted, that the taxpayers had bought the farm, then let it for years when the cattle project fell through, and only sold it when they found that it had greatly increased in value. The *California Copper Syndicate* case (1904), 5 Tax Cas. 159; *Commissioners of Taxes* v. *Melbourne Trust, Ltd.* [1914] A.C. 1001, and *Rees, etc., Syndicate* v. *Ducker* (1928) 13 Tax Cas. 366, showed that the memorandum of association of a company might be looked at in order to ascertain the purpose with which it made a certain purchase. Here there was no such document to look at, and their evidence that they did not buy the farm in 1924 by way of trade had been accepted. *Aldwarke Coy., Ltd.* v. *I.R.C.*, 18 Tax Cas. 125, did not permit the Commissioners here, in the guise of drawing inferences, to make a finding of fact in the teeth of evidence which they had accepted. Appeal allowed. Assessment discharged.

APPEARANCES: *Donovan*, K.C., and *Graham-Dixon* (*Tuck and Mann*, for *Wallace Robinson & Morgan*, Birmingham); *Tucker*, K.C., and *Hills* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

HOUSE OF LORDS

A. PROGRESS OF BILLS

Read First Time :—

Minister of Food (Financial Powers) Bill [H.C.] [15th February.

Newfoundland (Liberation) Bill [H.L.] [17th February.
To restore self-government to Newfoundland.

Read Second Time :—

National Theatre Bill [H.C.] [17th February.
Solicitors, Public Notaries, etc., Bill [H.C.] [15th February.
Special Roads Bill [H.C.] [17th February.

Read Third Time :—

Agricultural Wages (Scotland) Bill [H.L.] [17th February.
Coast Protection Bill [H.L.] [15th February.
Criminal Justice (Scotland) Bill [H.L.] [17th February.

In Committee :—

Cinematograph Film Production (Special Loans) Bill [H.C.] [17th February.

B. QUESTIONS

Lord CALVERLEY asked whether the Government would make a regulation extending to all police forces the power exercised by the London police of stopping and searching a person reasonably suspected of carrying goods stolen or otherwise unlawfully obtained. In reply, the LORD CHANCELLOR said that the circumstances which necessitated this power in London did not obtain in the provinces. The power already existed in certain parts of the provinces, such as Manchester, and it was open to other areas to establish the need for this power and action would then be taken. The law rightly stacked the cards against the prosecution, and he did not think the general law ought to be altered. [16th February.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time :—

Lands Tribunal Bill [H.C.] [16th February.

To establish new tribunals to determine in place of official arbitrators and others certain questions relating to compensation

for the compulsory acquisition of land and other matters, to amend the Acquisition of Land (Assessment of Compensation) Act, 1919, with respect to the failure to deliver a notice of claim, and for purposes connected therewith.

Social Services (Northern Ireland Agreement) Bill [H.C.] [14th February.

To confirm and give effect to an agreement made between the Treasury and the Ministry of Finance for Northern Ireland with a view to assimilating the burdens on the Exchequer of the United Kingdom and the Exchequer of Northern Ireland in respect of certain social and allied services.

Superannuation Bill [H.C.] [16th February.

To amend the law relating to the superannuation and other benefits payable to and in respect of persons who serve or have served in the civil service of the State or in the service to which the Superannuation (Various Services) Act, 1938, applies or are existing Irish officers within the meaning of the Government of Ireland Act, 1920; to authorise the payment of annual allowances and gratuities to and in respect of persons who are injured or contract diseases while employed in a civil capacity for the purposes of His Majesty's Government in the United Kingdom; and for purposes connected with the matters aforesaid.

Read Second Time :—

Adoption Bill [H.C.] [18th February.
Bolton Corporation Bill [H.C.] [16th February.
City of London (Various Powers) Bill [H.C.] [15th February.
Married Women (Maintenance) Bill [H.C.] [18th February.
Milk (Special Designations) Bill [H.L.] [21st February.
Slaughter of Animals (Scotland) Bill [H.C.] [18th February.

Read Third Time :—

Clydebank Burgh Order Confirmation Bill [H.C.] [18th February.
Juries Bill [H.C.] [21st February.

B. Debates

In moving the second reading of his Bill, the Safety of Employment (Employers' Liability) Bill, Mr. Piratin said it was an entirely new approach to the problem of protection for workpeople. Existing statutory law, the Quarries, Coal Mines, and Factories Acts, applied to only about half the total working population, and the remainder had only common law to rely upon, viz.: the requirements of proper plant and equipment, a safe system of work, freedom from traps of which the employer should be aware, and the employing of competent staff. The Bill would provide equal treatment for *all* workers with regard to enforcement and compensation; there would be a common statutory standard of safety applicable to *all* contracts of service; and, finally, the Minister would have power to make regulations for *all* trades, occupations and premises. It would write into every contract of employment a term that the employer shall take all practicable measures and provide and maintain all practicable means to prevent injury to the employee. The Bill was well received on both sides of the House, but Mr. Isaacs pointed out that the Report of the Gowers Committee, appointed to deal, *inter alia*, with this very matter, was expected in three or four weeks' time and the Government would prefer to introduce any necessary legislation itself after making use of all means of consultation with interested parties. On Mr. Isaacs undertaking to bring in such legislation, if reasonably practicable, within the life of the present Parliament, Mr. Piratin withdrew his Bill. [11th February.

C. Questions

Criminal Law

Mr. Chuter Ede stated that the Minister of Education and he proposed to invite representatives of the churches, local authorities and other interests concerned to a conference at the beginning of March to discuss juvenile delinquency and the general background of moral standards. [10th February.

Mr. Ede informed Mr. Kenneth Lindsay that the number of juveniles found guilty of indictable offences per 100,000 of the population of their age group was highest in the 14/17 group. He agreed that a State honesty campaign would not affect this group, and said that every effort should be made to bring home to the general population the necessity of maintaining the highest moral standards. [17th February.

Mr. Ede stated that the position as regards remand home and approved school accommodation had improved as against last year and was improving. The figures for corporal punishment in these institutions showed little change. [17th February.

Matrimonial Law

The Attorney-General said that the difficulties arising from the rule that the wife takes the domicile of her husband was receiving consideration, but he could not at present promise legislation. He said he would consider the position of women married to Newfoundlanders, Mrs. Middleton having pointed out that there was no divorce in Newfoundland and the wives had therefore no remedy at all. [14th February.

The Attorney-General stated that the Government considered that legislation would be needed to give full effect to the recommendations of the Denning Committee with regard to the appointment of court welfare officers in the High Court to safeguard the interests of children. The possibility of appointing probation officers to assist the court in cases where custody of the children was being disputed was under consideration. [16th February.

Mr. Chuter Ede said he agreed that a large number of innocent parties were adversely affected by the present arrangements for the enforcement of payments under maintenance orders made in the magistrates' courts. He said that the courts did all they could to assist in tracing husbands who disappeared, but he had already been pressed to find other duties for the police that afternoon. Mrs. Middleton said the position was serious and she would raise the matter on the Adjournment as soon as possible. [17th February.

Miscellaneous

Mr. Bevan stated that up to 31st January, 1949, rents of furnished tenancies had been reduced by the Tribunals in 16,207 cases and increased in 284 cases. [10th February.

The Attorney-General announced that the Leasehold Committee intended shortly to present an interim report dealing with business premises. The Lord Chancellor had not yet received a report from that committee dealing with leasehold enfranchisement. [14th February.

Mr. King stated that no formal obligation rested on local planning authorities to notify or consult amenity societies before proceeding with development, but in fact much informal consultation did take place. [15th February.

Mr. Griffiths said he had considered the position where a man's claim under the Workmen's Compensation Acts was barred by lapse of time and he was not able to claim under the Industrial Injuries Act because he had not been employed since July, 1948, and he was considering whether men entitled to payments of workmen's compensation, as regards disabilities arising from employment before that date, could not be brought within the provisions of the new scheme. He could see no possibility of including men whose claims under the Workmen's Compensation Acts were time-barred. [15th February.

Mr. Bevan stated that legislation would be introduced this session to implement the findings of the Slade Committee on Medical Partnerships. [17th February.

The Prime Minister announced the setting up of a Royal Commission "to enquire into the existing law and practice thereunder relating to lotteries, betting and gaming, with particular reference to the developments which have taken place since the report of the Royal Commission on Lotteries and Betting in 1933, and to report what changes, if any, are desirable and practicable." [10th February.

STATUTORY INSTRUMENTS

Town and Country Planning (General Development Amendment) Order, 1949 (S.I. 1949 No. 195).
As to this Order, see *ante* p. 107.

Urban District Council Election Rules, 1949 (S.I. 1949 No. 197).

County and Borough Election Forms Regulations, 1949 (S.I. 1949 No. 210).

London County Council and Metropolitan Borough Councils Election Forms Regulations, 1949 (S.I. 1949 No. 211).

Representation of the People Regulations, 1949 (Draft).

Bankruptcy (Amendment) Rules, 1949 (S.I. 1949 No. 203 (L.2)).
As to these Rules, see *ante* p. 108.

PARLIAMENTARY PUBLICATIONS

Adoption Bill (House of Commons Bills, Session 1948–49, No. 51).

The principal proposed changes in this private member's Bill are that an illegitimate child should be capable of being adopted by the mother, or the natural father, either alone or jointly with a spouse, and that the child should be in the care of the adopting parents for a probationary perod of three months before the order is made.

FALSA DEMONSTRATIO NON OLET

THE poet Horace once pointed out that what is apprehended by the eye makes a greater impression upon the mind than what is absorbed through the ear. Indignant correspondents to *The Times* have recently implied a similar superiority for sight over the senses of smell and taste. Several letters have appeared complaining of the alleged prevalent practice of dyeing or varnishing the homely kipper—a practice which, it is suggested, imparts to this staple item of the English breakfast a glossy and attractive appearance, but renders it intractable in the frying-pan and nauseating to the palate. If it be true that fishmongers generally are adopting this repulsive custom, they are assuming a grave responsibility and taking a serious legal risk.

One writer has gone so far as to suggest that the practice should by statute be made a criminal offence. Desirable as this may be, it is to be feared that hopes of legislation on the subject are doomed to disappointment. For some unfathomable reason the kipper (like the lodger and the mother-in-law) belongs to the mysterious class of institutions which are deemed to be funny *per se*. It is difficult to know why this should be, for the humble herring, in any form, is a succulent and nutritious food. And yet, as W. S. Gilbert wrote in another connection—

> " And yet the prospect of a lot
> Of dull M.P.s, in close proximity,
> All thinking for themselves, is what
> No man can face with equanimity."

If the subject of their free thinking and free voting were the Kippers (Discontinuance of Dyeing) Bill or the Varnishing of Kippers (Prohibition) Bill, 1949, *Hansard* would record speeches and interjections of a nature to shake the equanimity and the gravity of the Mother of Parliaments. Consider how the evening newspapers would make capital out of the headlines " DYEING KIPPERS SCANDAL " and " KIPPERS DYE HARD "! The lobbies would be crowded with opposing factions, the Pro- and Anti-Varnishers, and the approaches to the House would be blocked with banners bearing rival slogans ; worse still, perhaps, rival symbols.

Drastic methods of this kind are scarcely called for, since it would appear that (apart from the statutes dealing with Food and Drugs) the consumer has a remedy at common law. Halsbury reminds us that " the seller of an article presenting a certain appearance to the senses of the purchaser is deemed to state, in so acting, that the article is in fact what it purports to be, and that there has been no concealment or covering up of defects, or other device or manoeuvre, whereby the outward semblance of the article is made to lie as to its substance and reality." The *dictum* of Quain, J., in *Fitzpatrick* v. *Kelly* (1873), L.R. 8 Q.B. 337, is certainly in point : " when a man asks for butter, and the tradesman, without more ado, sells him an article which seems to be butter, the representation is that the article is butter, that is, unadulterated butter." Applying that *dictum* to the present issue, the man who wants a plain, unvarnished kipper, is entitled to treat the alleged prevalent practice as grounds for an action for misrepresentation, if not fraud ; and the minority who like their kippers flavoured with dye or varnish must either expressly stipulate for such special refinements before contract or see their interests sacrificed to those of the majority whose taste is more austere.

But more than adulteration is at stake. Undyed and unvarnished, the kipper has this advantage over a legal document—that it may be said (so to speak) to date itself ; its freshness or antiquity can be readily established by sensual perception. Tricked out in its coat of glossy varnish, or dyed a rich gold, it may preserve an outward aspect pleasing to the eye but be intrinsically pernicious. Perhaps this is what Hamlet had in mind :

> " Lay not that flattering unction to your soul !
> It will but film and skin the ulcerous place,
> Whiles rank corruption, mining all within,
> Infects unseen."

Viewed from this standpoint, the purchasing of what looks like a kipper is fraught for the unwary with as many dangers as the purchase of a purported Georgian settee. The latter article may be of poor quality, indifferent workmanship and recent manufacture ; it is got up, with its air of sham elegance, its slightly musty appearance and its synthetic wormholes, to the semblance of a genuine antique. On the other hand the dyed and varnished kipper, shining and sleek in its apparent freshness, may conceal an unwelcome antiquity. Though the cases are converse, the moral is the same : *caveat emptor* can have no application where fraud has been at work.

The practice seems not to have been unknown in Shakespeare's day. Doubtless Caliban had been treated in this manner when Trinculo first met him :

> " What have we here ? a man or a fish ? dead or alive ? A fish : he smells like a fish : a most ancient and fish-like smell : a kind of not-the-newest Poor-John. A strange fish ! Were I in England now (as once I was), and had but this fish painted, not a holiday fool there but would give a piece of silver."

A. L. P.

NOTES AND NEWS

Honours and Appointments

Mr. J. W. BLOMELEY, of Bury, has been appointed Assistant Solicitor to Rawtenstall Corporation.

Mr. KENNETH ROUND, a member of the staff of Kent County Prosecuting Solicitor, has been appointed Assistant County Prosecutor for Essex. He was admitted in 1943.

Mr. NIGEL RYLAND, first Assistant Solicitor to Manchester Corporation, has been appointed Legal Adviser to Liverpool Regional Hospital Board. He was admitted in 1935.

Mr. D. J. TAYLOR, Assistant Solicitor to Blackburn Corporation for the past two years, has been appointed Senior Assistant Solicitor to Stoke-on-Trent Corporation. He was admitted in 1942.

Mr. T. J. R. WHITFIELD, of Durham, has been appointed to the staff of Kent County Prosecuting Solicitor.

Mr. H. C. WICKHAM, solicitor, of Chester, has been appointed Clerk to the newly constituted Rivers Dee and Clwyd Fishery Board. He was admitted in 1931.

Personal Notes

Mr. Brian Clapham, solicitor, of Bromley, who was admitted in 1945, is returning to the Bar. Mr. Clapham was first called to the Bar in 1936 and has now been taken off the Roll of Solicitors pending his recall.

Mr. Percy Haddock, Clerk to the Cheltenham Magistrates, is resigning the position from 1st April. Mr. Haddock is senior partner in the firm of Haddock, Pruen & Lintott, of Cheltenham, and was admitted in 1895.

Wills and Bequests

Mr. Arthur Edwin Clarke, solicitor, of Weybridge, left £66,610.

Mr. C. H. Wright, solicitor, of Cannon Street, E.C.4, left £60,724, net personalty £13,476.

SOCIETIES

The annual dinner and ball of NOTTINGHAM LAW STUDENTS' SOCIETY was held on 11th February, Judge A. C. Caporn presiding.

The guest of honour at the annual dinner on 18th February of the PONTYPRIDD, RHONDDA AND DISTRICT LAW SOCIETY was Sir W. Alan Gillett, President of The Law Society. Mr. D. Leonard Davies, president of the branch, proposing the toast of " The Law Society," referred to their efforts to bring into force the Legal Aid and Advice Bill now before Parliament, and said it was worthy of note that it would be a scheme administered by the profession and not by the State. He extended a warm welcome to Sir Alan and, in recapitulating the record of their branch, said he was pleased to be able to state that it was practically 100 per cent. strong. Sir Alan, responding, said that about 16,000 practising solicitors were members of The Law Society and, in addition to these, a large number of men in salaried positions were also members, bringing the total to about 24,000. Other speakers during the evening were Col. Sir Gerald T. Bruce (Lord-Lieutenant of Glamorgan), his Honour Judge O. Temple-Morris, K.C., his Honour Judge Trevor Morgan, K.C., Mr. W. Naunton Evans, solicitor, of Tonypandy, Mr. C. James Hardwicke, solicitor, of Cardiff, and Lt.-Col. D. Harold Rees, solicitor, of Pontypridd.

A meeting of the UNITED LAW SOCIETY was held in the Barristers' Refreshment Room, Lincoln's Inn, on Monday, 14th February, 1949. The motion " That professionalism in sport is a national menace " was defeated by two votes.

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